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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MIKE HERNANDEZ,

Defendant.

CASE NO. 1:22-CR-00160-ADA-BAM

STIPULATION TO VACATE SUPPLEMENTAL
BRIEFING SCHEDULE, SET CHANGE OF PLEA
HEARING, AND EXCLUDE TIME UNDER
SPEEDY TRIAL ACT; FINDINGS AND ORDER

BACKGROUND

This case is set for a Status Conference on October 26, 2022. On May 13, 2020, this Court issued General Order 618, which suspends all jury trials in the Eastern District of California “until further notice.” Under General Order 618, a judge “may exercise his or her authority to continue matters, excluding time under the Speedy Trial Act with reference to the court’s prior General Order 611 issued on March 17, 2020 . . . with additional findings to support the exclusion in the Judge’s discretion.” General Order 618, ¶ 6 (E.D. Cal. May 13, 2020). In addition, any judge “may order case-by-case exceptions” to General Order 618’s provisions “at the discretion of that Judge or upon the request of counsel, after consultation with counsel and the Clerk of the Court to the extent such an order will impact court staff and operations.” General Order 618, ¶ 7 (E.D. Cal. May 13, 2020). This and previous General Orders were entered to address public health concerns related to COVID-19.

Although the General Orders address the district-wide health concern, the Supreme Court has

1 emphasized that the Speedy Trial Act’s end-of-justice provision “counteract[s] substantive
 2 openendedness with procedural strictness,” “demand[ing] on-the-record findings” in a particular case.
 3 *Zedner v. United States*, 547 U.S. 489, 509 (2006). “[W]ithout on-the-record findings, there can be no
 4 exclusion under” § 3161(h)(7)(A). *Id.* at 507. Moreover, any such failure cannot be harmless. *Id.* at
 5 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a
 6 judge ordering an ends-of-justice continuance must set forth explicit findings on the record “either orally
 7 or in writing”).

8 Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory
 9 and inexcusable—General Orders 611, 612, 617, and 618 require specific supplementation. Ends-of-
 10 justice continuances are excludable only if “the judge granted such continuance on the basis of his
 11 findings that the ends of justice served by taking such action outweigh the best interest of the public and
 12 the defendant in a speedy trial.” 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable
 13 unless “the court sets forth, in the record of the case, either orally or in writing, its reason or finding that
 14 the ends of justice served by the granting of such continuance outweigh the best interests of the public
 15 and the defendant in a speedy trial.” *Id.*

16 The General Orders exclude delay in the “ends of justice.” 18 U.S.C. § 3161(h)(7) (Local Code
 17 T4). Although the Speedy Trial Act does not directly address continuances stemming from pandemics,
 18 natural disasters, or other emergencies, this Court has discretion to order a continuance in such
 19 circumstances. For example, the Ninth Circuit affirmed a two-week ends-of-justice continuance
 20 following Mt. St. Helens’ eruption. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court
 21 recognized that the eruption created “appreciable difficulty” for the trial to proceed. *Id.* at 767-69; *see*
 22 *also United States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time
 23 following the September 11, 2001 terrorist attacks and the resultant public emergency).

24 The coronavirus poses a similar, albeit more enduring, “appreciable difficulty” to the prompt
 25 proceedings mandated by the statutory rules. Recently, the Ninth Circuit enumerated a “non-
 26 exhaustive” list of seven factors it found to be “relevant” in considering ends-of-justice Speedy Trial Act
 27 continuances “in the context of the COVID-19 pandemic.” *United States v. Olsen*, --- F.3d ---, 2021 WL
 28 1589359 at *7 (9th Cir. Apr. 23, 2021). That non-exhaustive list includes: (1) whether a defendant is

1 detained pending trial; (2) how long a defendant has been detained; (3) whether a defendant has invoked
 2 speedy trial rights since the case's inception; (4) whether a defendant, if detained, belongs to a
 3 population that is particularly susceptible to complications if infected with the virus; (5) the seriousness
 4 of the charges a defendant faces, and in particular whether the defendant is accused of violent crimes;
 5 (6) whether there is a reason to suspect recidivism if the charges against the defendant are dismissed;
 6 and (7) whether the district court has the ability to safely conduct a trial. *Id.*

7 In light of the foregoing, this Court should consider the following case-specific facts in finding
 8 excludable delay appropriate in this particular case under the ends-of-justice exception, § 3161(h)(7)
 9 (Local Code T4). If continued, this Court should designate a change of plea hearing on November 7,
 10 2022. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial continuance must
 11 be "specifically limited in time").

12 STIPULATION

13 Plaintiff United States of America, by and through its counsel of record, and defendant, by and
 14 through defendant's counsel of record, hereby stipulate as follows:

15 1. By previous order, this matter was set for Status Conference on October 26, 2022.

16 2. By this stipulation, the parties now move to vacate the status conference on October 26,
 17 2022, set this the case for a change of plea hearing on November 7, 2022, at 8:30 a.m., and to exclude
 18 time between October 26, 2022, and November 7, 2022, at 8:30 a.m., under 18 U.S.C. § 3161(h)(7)(A),
 19 B(iv) [Local Code T4], and 18 U.S.C. § 3161(h)(1)(G) [Local Code 7].

20 3. The parties agree and stipulate, and request that the Court find the following:

21 a) The defendant has signed a plea agreement, which was filed with the Court on
 22 October 19, 2022.

23 b) The parties have jointly requested that the Court set the matter for a change-of-
 24 plea hearing on November 7, 2022, at 8:30 a.m..

25 c) The government does not object to the continuance.

26 d) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161,
 27 et seq., within which trial must commence, the time period of October 26, 2022, to November 7,
 28 2022, inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(1)(G), as it results from

consideration by the Court of the proposed plea agreement filed at docket number 15.

4. Nothing in this stipulation and order shall preclude a finding that other provisions of the Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial must commence.

IT IS SO STIPULATED.

Dated: October 19, 2022

PHILLIP A. TALBERT
United States Attorney

/s/ ANTONIO J. PATACA
ANTONIO J. PATACA
Assistant United States Attorney

Dated: October 19, 2022

/s/ ERIC KERSTEN
ERIC KERSTEN
Counsel for Defendant
MIKE HERNANDEZ

ORDER

IT IS SO ORDERED that the status conference set for October 26, 2022, is vacated. A change of plea hearing is set for **November 7, 2022, at 8:30 a.m. before District Judge Ana de Alba**. Time is excluded pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv).

IT IS SO ORDERED.

Dated: **October 20, 2022**

/s/ *Barbara A. McAuliffe*
UNITED STATES MAGISTRATE JUDGE